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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM THOMAS BURGESS III, Defendant and Appellant.	A144388 (Solano County Super. Ct. No. FCR297569)

In 2013, defendant was convicted of a felony violation of Penal Code section 496, subdivision (a).[1] In November 2014, defendant filed a petition for resentencing pursuant to Proposition 47. (See § 1170.18, subd. (a).) He claimed that the prosecution never pled nor proved that the stolen property exceeded $950, and had Proposition 47 been in effect in 2013, he would have been convicted of a misdemeanor, not a felony. The trial court denied his petition, finding that the value of the property, as stated in the probation report, exceeded $950.

Defendant appeals and contends the trial court erred in relying on the victim's statement in the probation report to establish the value of the stolen property because the police report was not part of the record of conviction and the victim's statement was hearsay. Defendant asserts that the People had to prove

[1] All further unspecified code sections refer to the Penal Code.

every element of the crime and nothing in the record of conviction established the value of the property.

Defendant's arguments on appeal have been largely addressed and rejected by the Fourth Appellate District in *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*) and Division Five of this court in *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444 (*Rivas-Colon*). These courts hold that the defendant has the burden of showing that the offense is a misdemeanor rather than a felony under section 1170.18. We agree with these courts' reasoning. Defendant did not meet his burden; thus, the trial court properly denied his petition.

BACKGROUND

On December 19, 2012, a felony complaint was filed charging defendant with one count of receiving stolen property (§ 496, subd. (a)),[2] which was Bridgestone golf clubs, and misdemeanor possession of burglar tools (§ 466). The complaint also alleged two prison priors pursuant to section 667.5, subdivision (b). Defendant waived his right to a preliminary hearing and, on April 5, 2013, an information was filed setting forth the same charges and allegations that were in the December complaint.

On July 2, 2013, defendant pled no contest to both counts and admitted the prison priors. The parties stipulated to a factual basis in the police reports.

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[2] In 2012, former section 496, subdivision (a) read: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed nine hundred fifty dollars ($950), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year."

The probation presentencing report was filed on August 6, 2013. The report indicated that the police conducted a parole search of defendant's home and found a golf bag and clubs with receipts and club head covers with the victim's name. The victim was contacted and reported that the clubs had been stolen from his vehicle. According to the report, the victim "estimated the golf equipment was worth over $2,000.00."

On August 6, 2013, the trial court suspended defendant's five-year county jail sentence, and granted defendant probation.[3] On January 31, 2014, defendant admitted violating probation and the court imposed the five-year prison term.

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhood and Schools Act, which became effective November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, sections 1170.18 and 490.2.[4] Section 1170.18 creates a process permitting persons previously convicted of crimes as felonies, which might be misdemeanors under the new definitions in Proposition 47, to petition for resentencing. Under sections 1170.18, subdivision (a), and 490.2, receiving stolen property (§ 496, subd. (a))[5] is

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[3] The calculation of the suspended sentence included the upper term of three years for the conviction for receiving stolen property, a concurrent six-month term for possession of burglar tools, and one year each for the two prison priors.

[4] Section 490.2, subdivision (a), provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft . . . ."

[5] After Proposition 47, section 496, subdivision (a) was amended to read: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision

an offense that qualifies for resentencing if the value of the property is less than $950. Section 1170.18, subdivision (b), provides in part: "Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria for subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . ."

On November 14, 2014, defendant filed a two-page "petition for recall of sentence and request for resentencing" pursuant to section 1170.18, subdivision (a). He argued that had Proposition 47 been in effect at the time of his conviction, he would have been convicted of a misdemeanor, rather than a felony, offense. His petition did not set forth any alleged value of the golf clubs, which had been the basis for his conviction for receiving stolen property. The People opposed the petition based on the victim's estimate in the probation report that the stolen property was worth more than $2,000.

On December 3, 2014, the trial court held a hearing on defendant's Proposition 47 petition. The prosecution told the court that she had looked at the police report and noted that the victim estimated the value of the golf clubs taken by defendant was $2,000. Defense counsel replied that he read "the same thing in the police report," but this report was not part of the record of conviction.

Defendant contended at the hearing that Proposition 47 added a new element to the felony offense of receiving stolen property, and the prosecution had failed to prove the stolen property was worth more than $950; he was therefore entitled to have his felony conviction reduced to a misdemeanor. Defendant maintained that the trial court could not rely on the probation report to establish the value of the golf clubs, and could rely solely on the plea agreement. The court observed that it was not clear whether the value of the golf clubs was part of the

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(h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor . . . ."

stipulation. The prosecution responded that at the time of the stipulation, the amount was not an element needing to be established, and therefore was not part of the record.

The prosecution stated: "I don't know exactly what at this point the proper remedy would be . . . . So I don't know if the next step would then have to be a hearing on the amount to have that established or what the next remedy would be at this point, but for the record I am making an objection based on the amount for the reduction." The trial court explained that it had never heard of an evidentiary hearing for a petition for recalling the sentence. Defendant opposed any new evidentiary hearing, and argued: "I don't think there is legal—it would be my position that the People can't sort of go back in time now and try to prove up something that is not part of the record of the conviction when the sentencing is final. I would object to that happening." The trial court ordered additional briefing and set the next hearing for December 17, 2014.

At the hearing on December 17, 2014, defendant argued that the prosecution had the burden of proof and the proof had to be in the record of conviction. The prosecution countered that the court could rely on the probation reports. The trial court took the matter under submission, observing, "I do think that there is an important question, as to if the court can rely on the probation report for sentencing, whether it can rely on the probation report for resentencing, and I need to be able to spend some time to address that particular issue."

On January 13, 2015, the trial court filed its order denying defendant's petition for resentencing pursuant to section 1170.18, subdivision (a). The court observed that the statute is silent on whether it can refer to the probation report to establish the value of the stolen property. It noted that it "is illogical that such a report could be used for sentencing, but not for resentencing." It thus considered the victim's estimate of the value of the golf clubs in the probation report and found that the clubs were worth more than $950.

Defendant filed a timely notice of appeal.

DISCUSSION

As noted above, after the enactment of Proposition 47 (§ 1170.18, subd. (a)), the offense of receiving stolen property is a misdemeanor if the value of the property does not exceed $950 (§ 496, subd. (a)). Section 1170.18, subdivision (a) provides that "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case . . . ." If the court determines that the "petitioner satisfies the criteria in subdivision (a)," the petitioner shall have his or her sentence recalled and be "resentenced to a misdemeanor" . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Defendant contends that Proposition 47 added a new element to the felony offense of receiving stolen property (§ 496, subd. (a)), i.e., that the value of the stolen property is greater than $950, and the People must prove that element beyond a reasonable doubt. Since the People failed to do that, he claims that his conviction should be reduced to a misdemeanor. He asserts that the trial court violated his constitutional rights by relying on the victim's statement in the probation report. Finally, defendant contends that even if he had the burden of proof, his claim that there was no competent evidence showing that the property exceeded $950 satisfied that burden.

None of the cases upon which defendant relies to argue that the prosecution has the burden of proof concerns resentencing after a final judgment and/or resentencing after Proposition 47. (See, e.g., *In re Estrada* (1965) 63 Cal.2d 740, 742, 748 [held that an amendatory statute reducing punishment for a crime applies in all cases not yet final on appeal].) In his reply brief, defendant concedes that cases decided subsequent to his Proposition 47 hearing do not support his position. Both *Sherow, supra*, 239 Cal.App.4th 875 and *Rivas-Colon, supra*, 241

Cal.App.4th 444, filed on August 11, 2015, and October 16, 2015, respectively, hold that the petitioner has the burden of showing that he or she is eligible for a reduced sentence under Proposition 46.

In *Sherow, supra,* 239 Cal.App.4th 875, the defendant had been convicted of nine counts of second degree burglary and, on appeal, he challenged the trial court's refusal to resentence him on two of these counts. (*Id.* at p. 877.) He contended that the record did not demonstrate that the loss on these counts exceeded $950 "and thus the two counts should be resentenced as misdemeanors[,]" and that the prosecution had the burden of proving he was not eligible for resentencing. (*Id.* at pp. 877-878.)

The *Sherow* court observed that Proposition 47 does not explicitly allocate a burden of proof. (*Sherow, supra,* 239 Cal.App.4th at p. 878.) The court pointed out, "As an ordinary proposition: ' "[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." ' [Citations.]" (*Id.* at p. 879.) The court held that the petitioner "must establish his or her eligibility" for such relief and has the "initial burden of proof" to "establish the fact[] upon which his or her eligibility is based." (*Id.* at pp. 878-880.) In making such a showing, "[a] proper petition could certainly contain at least [the petitioner's] testimony about the nature of the items taken." (*Id.* at p. 880.)

Our court in *Rivas-Colon, supra,* 241 Cal.App.4th 444, cited *Sherow, supra,* 239 Cal.App.4th 875, when rejecting the defendant's argument that the prosecution had the burden of establishing the value of the property was more than $950. (*Rivas-Colon,* at p. 449.) The defendant in *Rivas-Colon* had stipulated to a factual basis for the plea contained in the police report, which listed the value of the property he removed from a store as $1,437.74. (*Id.* at p. 447.) The appellate court explained that the defendant had not provided any evidence or argument demonstrating that he was eligible for resentencing and therefore the trial court properly denied his resentencing petition. (*Ibid.*)

Defendant attempts to distinguish his situation from those in *Sherow* and *Rivas-Colon*. Defendant argues that, unlike the present case, "nothing in the record [in *Sherow*] showed the amounts involved in the two counts the petitioner sought to have reduced." In *Rivas-Colon* the police receipt referred to a store receipt showing the value of the stolen property as being more than $950 and the defendant, unlike him, did not object to the trial court's relying on this evidence.

Defendant's attempts to distinguish his present situation from those in *Sherow* and *Rivas-Colon* are unavailing. The facts mentioned by defendant had no bearing on the courts' holdings that the petitioner has the burden of proving that he or she is eligible for relief.

We agree with the reasoning in both *Sherow* and *Rivas-Colon*. These courts' analyses are consistent with the well-established rule set forth in Evidence Code section 500, which reads: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (See also *People v. Barasa* (2002) 103 Cal.App.4th 287, 295-296 [under Evidence Code section 500, defendant has the burden of proving that his drug possession or transportation was for personal use and that he was therefore eligible for sentence reduction under Proposition 36]; *People v. Atwood* (2003) 110 Cal.App.4th 805, 812 [under Evidence Code section 500, "[t]he burdens of producing evidence and of persuasion flow from a party's status as a claimant seeking relief"].) Defendant is the party who petitioned for relief, and therefore he had the initial burden of demonstrating eligibility under section 1170.18, subdivision (a).

Defendant claims that he met his burden by arguing that the evidence showing the value of the golf clubs was hearsay. He claims that the trial court's reliance on this unreliable evidence violated his Sixth Amendment right to a jury trial and his due process right under the Fourteenth Amendment. The court in *Rivas-Colon, supra,* 241 Cal.App.4th 444 explained that the question posed by a resentencing petition under Proposition 47 is not whether to increase the

punishment for the offense, but whether the petitioner is eligible for a potential reduction of the sentence. (*Rivas-Colon,* at p.452.) Accordingly, defendant "had 'no right to a jury determination of his eligibility for resentencing.' " (*Ibid.*)

Defendant's due process argument also has been soundly rejected in *Sherow, supra,* 239 Cal.App.4th 875. The *Sherow* court explained that due process is relevant to the initial prosecution for an offense, not resentencing under Proposition 47. Resentencing concerns people who have already been proved guilty of their offense beyond a reasonable doubt. (*Sherow, supra,* 239 Cal.App.4th at p. 880.) Here, the trial court might have ruled based on the information in the probation report, but we need not consider whether the court erred by relying on the victim's statement recorded in the probation report. Defendant failed to meet his initial burden of showing that the golf clubs were worth less than $950, and therefore the court never needed to consider the victim's statement in the probation report.

Nothing in the record before us indicates that the Bridgestone golf clubs were worth $950 or less, and therefore defendant has failed to demonstrate error. (See, e.g., *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 ["the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error"].) We thus must affirm.

However, we will affirm without prejudice to permit defendant an opportunity to file a petition alleging facts showing that the golf clubs are worth $950 or less. Under *Sherow, supra,* 239 Cal.App.4th at page 880, a declaration regarding the value of the golf clubs could be sufficient to set the resentencing matter for hearing. On a sufficient showing the trial court "can take such action as appropriate to grant the petition or permit further factual determination." (*Ibid.*)

Here, defendant did on two occasions voice opposition to an evidentiary hearing. However, those objections were raised without the guidance of *Sherow* and *Rivas-Colon* and prior to any appellate court's interpretation of the proper

procedure for petitioning for resentencing under Proposition 47. The parties and trial court erroneously believed that the prosecution had to present evidence that the golf clubs' value exceeded $950. We thus conclude that it would be unfair to foreclose the opportunity for defendant to come forward with evidence to show that the golf clubs' value did not exceed $950.

DISPOSITION

The order denying defendant's petition for resentencing is affirmed without prejudice to subsequent consideration of a properly filed resentencing petition. (*Sherow, supra,* 239 Cal.App.4th at p. 881.)

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

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